LIBRARY
SUPREME COURT, U. S.

JUL 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-126

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

ALAN D. PIERCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

On Petition for Review of the Judgment of the Supreme Court of Pennsylvania.

RALPH B. D'IORIO,
Chief, Appeals Division,
WILLIAM R. TOAL, JR.,
First Assistant District Attorney,
STEPHEN J. McEWEN, JR.,
District Attorney,
Attorneys for Petitioner.

Court House,
Media, Pennsylvania. 19063

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Constitutional Provisions Involved	2
Statement of the Facts	3
Reasons for Granting the Writ	5
The Supreme Court of Pennsylvania's Decision That There Was a Violation of Respondent's Federal Constitutional Right to Trial by an Impartial Jury Was Based on an Unnecessary Extension, Unwarranted by the Facts in the Case, of the Rule Enumerated in the Applicable Decisions of This Court	5
The Record in the Case at Bar Conclusively Establishes That There Was No Identifiable Prejudice Against the Respondent Adversely Affecting His Constitutional Right to Trial by an Impartial Jury Wherefore His Conviction Should Have Been Affirmed	7
Conclusion	9
Appendix:	
Opinion of the Supreme Court of Pennsylvania	A1
Opinion of the Court of Common Pleas of Delaware County, Pennsylvania	A11
Order of the Supreme Court of Pennsylvania Denying Petition for Reargument	A21

CASES CITED.

	Page
Groppi v. Wisconsin, 400 U. S. 505	5
Reynolds v. United States, 98 U. S. 145	8
Rideau v. Louisiana, 373 U. S. 723	5, 6, 7
Sheppard v. Maxwell, 384 U. S. 333	5, 6, 7

MISCELLANEOUS.

	Page
28 U. S. C. Sec. 1257(3)	1
U. S. Constitution, Amendment XIV Sec. 1	2

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

The petitioner, the Commonwealth of Pennsylvania, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Pennsylvania rendered in these proceedings on March 15, 1973, a Petition for Re-Argument having been denied on May 3, 1973.

OPINIONS BELOW.

The Opinion of the Supreme Court of Pennsylvania, the Opinion of the Court of Common Pleas of Delaware County, Pennsylvania—Criminal Division and the Order of the Supreme Court of Pennsylvania denying the Commonwealth's Petition for Re-Argument appear at Appendix, infra, pp. A1, A11 and A21, respectively.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on March 15, 1973. See Appendix p. A10 infra. A timely Petition for Re-Argument was denied on May 4, 1973. See Appendix p. A21 infra. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

The Supreme Court of Pennsylvania reversed the conviction of the respondent for murder, holding that the trial court should have granted his motion for a change of venue.

The questions thereby arising are:

1. Whether the Supreme Court of Pennsylvania, without giving consideration to the substance of the voir

dire examination of prospective jurors, erred in holding that certain newspapers accounts, published within a period of ten days immediately following the commission of the crime, nine months before trial, in which respondent was quoted as having admitted to the police he was "the trigger man" and in which he was described as having participated in a re-enactment of the crime, a photograph taken during the re-enactment also being published, were so inherently prejudicial to the respondent that he was denied due process of law.

2. Whether the Supreme Court of Pennsylvania erred in reversing respondent's conviction of murder in the 1st degree and granting him a new trial where an exhaustive voir dire of prospective jurors conclusively established that there was no identifiable prejudice resulting from the newspaper articles published nine months before trial and that the jury empaneled was impartial, ready and able to try the case solely on the evidence and the law presented in court.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitution of the United States, Amendment XIV Sec. 1.

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF THE FACTS.

On April 7, 1969, two young men were accosted on the street in Media, Delaware County, Pennsylvania, asked for their money and then shot. There were three assailants, one of whom was the respondent, Alan Pierce. John Courtney, a seminarian and one of the victims, died from the gunshot wounds on May 18, 1969. Joseph O'Brien, a lawyer and member of the Delaware County Bar, was seriously injured but recovered.

On April 13, 1969, respondent was arrested in connection with the incident. On September 8, 1969, he and two others were indicted for murder in the Court of Common Pleas, Delaware County, Pennsylvania. Respondent's motion for a change of venue was denied on September 19, 1969. On January 17, 1970, he was found guilty of first degree murder and the jury fixed the penalty at death.

At trial the surviving victim, Joseph O'Brien, positively identified the respondent as the person who shot the decedent, John Courtney. A statement given by the respondent, and signed by him, in which he confessed to shooting Courtney, was admitted into evidence. Also admitted was testimony describing respondent's re-enactment of the shooting in the presence of the police the day after his arrest. Finally two ballistics experts testified that the bullet taken from Courtney's body was fired from the gun which was found in the home of one of the two other defendants in the shooting.

The respondent did not testify, did not call any witnesses and presented no evidence in his own behalf.

As with most crimes of this nature, area newspaper, radio and television media reported the incident. Most of the coverage centered around events which took place on the ten days that followed the incident. The respondent's trial began nine months thereafter.

On April 14, 1969, the Delaware County Daily Times, with a circulation of about 50,000 in a county with a population of approximately 600,000, reported that the respondent had admitted to police to being the "trigger man". The newspaper also quoted the police as saying respondent had a criminal record, dating back to 1963, which included arrests for car theft, assault and battery and carrying a concealed deadly weapon. On the same day the Philadelphia Inquirer, with a circulation of about 56,000 in Delaware County, also reported Pierce's criminal record.

On April 15, 1969, The Delaware County Daily Times published two pictures above an article on the shootings. One picture showed the respondent, Pierce, at the scene of the crime with police. The other was captioned: "Allen (sic) Pierce indicates for CID Detective, Edward Smith, where one of victims fell."

On March 15, 1973, The Supreme Court of Pennsylvania held that respondent had been denied due process of law because the trial court did not grant his motion for a change of venue. While recognizing that the United States Supreme Court ordinarily requires a showing of identifiable prejudice to the accused in claims of violation of due process, the Pennsylvania Supreme Court said:

> "Nevertheless, there are certain procedures employed by the states which involve such a probability of prejudice that they are deemed inherently lacking in due process . . . ." "We hold that the nature of the accounts released by the police were so 'inherently prejudicial' that Pierce need not have shown a nexus between the publicity and actual jury prejudice, and hence, he did not have the burden of showing identifiable prejudice". (Appendix at p. A4.)

The Commonwealth contends that the Supreme Court of Pennsylvania was in error in so holding.

REASONS FOR GRANTING THE WRIT.

The Supreme Court of Pennsylvania's Decision That There Was a Violation of Respondent's Federal Constitutional Right to Trial by an Impartial Jury Was Based on an Unnecessary Extension, Unwarranted by the Facts in the Case, of the Rule Enumerated in the Applicable Decisions of This Court.

In *Rideau v. Louisiana*, 373 U. S. 723, this Court held that petitioner had been denied due process because the trial court refused his request for a change of venue. In that case the police had staged a filmed "interview" with the accused in which he confessed to committing a murder, a robbery and a kidnapping. The interview was televised three times throughout the local area less than two months before his trial. This Court reversed the conviction, without examining the transcript of the voir dire testimony. In his dissenting opinion in *Groppi v. Wisconsin*, 400 U. S. 505, at 515, Mr. Justice Black explained that the rationale of the Court's decision in *Rideau* was that, on the facts in that case, "only a change of venue was constitutionally sufficient to furnish the kind of impartial jury that is guaranteed by the Fourteenth Amendment."

This rule of "inherent prejudice" was enunciated again in *Sheppard v. Maxwell*, 384 U. S. 333.

The Commonwealth respectfully contends that the facts of this case do not fit the rule of *Rideau* and *Sheppard, supra.* In short, this case in no way approaches the circumstances and the offensive character of what this Court condemned in *Sheppard v. Maxwell* and in *Rideau v. Louisiana.*

Even a cursory review of the record in this case will show that pre-trial publicity was not of such a degree that respondent could not get a fair trial. Also, it can be seen that police involvement in furthering the publicity,

which was the reason for the Supreme Court of Pennsylvania's decision, was actually rather limited.

In the brief filed in support of his motion for a change of venue, respondent cited eighteen issues of the Delaware County Daily Times which then had a circulation of about 50,000 in Delaware County, the population of which is approximately 600,000. It should also be noted that 45/47 of its circulation was in an area containing less than 50% of the county's population. Nine of these recounted events which happened within eight days of the crime. Most of the remaining articles were separated from each other by at least seven days. This was hardly the kind of news saturation which this Court found so offensive in *Sheppard*.

In addition, most of the articles were of a purely factual content of the type that is generally found in newspapers following a crime of this nature. Only two issues dealt directly with statements or activities of the police. See the Statement of the Facts p. 4, *supra*. The others which concerned the police merely recounted testimony given in various court proceedings: arraignments, preliminary hearings, etc. The record simply fails to show that the police were the instrument of publicity "inherently prejudicial" to respondent.

In *Sheppard* this Court was greatly concerned by the fact that the authorities disseminated to the press numerous "leads" that turned out to be false and various pieces of "evidence" that were never produced at trial. It was also noted in *Rideau*, that neither the interview nor a transcript of it was introduced at trial. In the instant case, however, respondent's confession and his re-enactment of the crime were both received in evidence at his trial.

Another important distinction can be made between the case at bar and *Sheppard* and *Rideau*. In *Rideau* the

televised interview took place on February 17, 1961 and his trial began on April 10, 1961, less than two months later. In *Sheppard,* the citizens of the community where the petitioner's trial was to be held were continually bombarded with inflammatory and prejudicial newspaper, television and radio reports from the day of his arrest to the final day of his trial.

Again, a study of the record in this case demonstrates that most of the publicity took place in the ten days immediately following the incident on April 7, 1969, including that attributed to the police. After this period, coverage by the media was limited. Respondent's trial was originally scheduled for September, 1969 but was ordered continued until January, 1970. The trial did not begin until January 6, 1970, nine months after the incident. This was certainly a sufficient length of time to erase the effects of even more pervasive publicity than was present in this case.

It is the Commonwealth's contention that the rule of *Rideau* does not apply to the facts of this case and that the decision of the Supreme Court of Pennsylvania represents an unnecessary extension thereof which threatens to prevent the conviction and punishment of criminals for any crime which receives more than a minimal amount of attention and review in the public press.

The Record in the Case at Bar Conclusively Establishes That There Was No Identifiable Prejudice Against the Respondent Adversely Affecting His Constitutional Right to Trial by an Impartial Jury Wherefore His Conviction Should Have Been Affirmed.

In those cases where there is no inherent prejudice this Court has held that a defendant in a criminal trial has the burden of showing identifiable prejudice against him

or no violation of due process will be found. In effect, he must satisfy this Court that at least one of the jurors formed an opinion against him before hearing the evidence at trial. "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States,* 98 U. S. 145. As stated in *Reynolds,* the test is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact . . ." At page 156 of 98 U. S. "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside . . ." At page 157 of 98 U. S.

The Commonwealth respectfully submits that respondent cannot show that any juror had formed an opinion against him. Five days were spent in the selection of a jury in the case at bar. The Notes of Testimony with respect to the Voir Dire number 685 pages. Seventy-six prospective jurors were available for duty and all were subject to extensive cross-examination by defense counsel. Only eight indicated that they had formed an opinion as to guilt or innocence. Of that number, six of the jurors stated that their opinion could be changed and a verdict rendered on the evidence. Not one of the eight was selected as a member of the panel.

The record also shows that of the twelve jurors and two alternates finally selected, six had read or heard nothing about the case. The other eight had only a general idea of what the details of the crime were and all said they had no opinion as to respondent's guilt or innocence.

It should further be noted that thirteen of the jurors did not see the pictures of the re-enactment of the crime in the newspaper. The other could not remember whether

he had. None of the jurors remembered Pierce as having been identified in any pre-trial publicity as a suspect in the case.

It is clear from the above that the exhaustive Voir Dire provided respondent with an impartial jury of his peers and one that met all of the requirements of due process.

CONCLUSION.

For the reasons above set forth, the Commonwealth respectfully requests your Honorable Court to issue a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

RALPH B. D'IORIO,
Chief, Appeals Division,
WILLIAM R. TOAL, JR.,
First Assistant District Attorney,
STEPHEN J. MCEWEN, JR.,
District Attorney,
Attorneys for Petitioner.

Appendix.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

EDGEN, *J.* FILED: MARCH 16, 1973

On January 16, 1970, the appellant, Alan D. Pierce, was convicted by a jury in Delaware County of murder in the first degree and the punishment was fixed at death.[1] A motion for a new trial was denied and sentence was imposed as the jury directed. This appeal followed.

The prosecution stemmed from the attempted robbery of John Courtney and Joseph O'Brien, Esq., while they were walking along a public street in Media, about 8:30 p.m. on April 7, 1969.

Several assignments of error are asserted, but only one need concern us.

Prior to trial Pierce filed a motion for a change of venue alleging he could not receive a fair trial by an impartial jury in Delaware County, because of the nature and quantity of the publicity which attached to the crime and his arrest. After a hearing the motion was denied. We have reviewed the evidence presented to the lower court in support of the application for a change of venue and now rule a change of venue should have been granted, and on this basis we reverse.

Because of the nature of the crimes and the fact that one of the victims was a seminarian and the other a practicing lawyer in Delaware County, the incident received wide coverage in the newspapers, and on radio and television. While much of the publicity was routine, factual,

1. At the same trial, Pierce was also convicted of robbery, violation of the Uniform Firearms Act, two counts of carrying a concealed deadly weapon, assault and battery, assault and battery with intent to kill and conspiracy. All of the charges arose from the same occurrence.

and wholly lacking in inflammatory content, a great deal of publicity about Pierce was emotionally charged and inflammatory, and clearly pointed to his guilt. A brief review of some of the inflammatory news coverage will show the quality of the publicity. In one story the police were quoted as stating Pierce had been arrested, and he verbally confessed to the double shooting. The story read: "[Police] He's the triggerman . . . He admitted he did it and now he's crying and weeping." The story went on to state: "Police said Pierce's record dates to 1963 and includes arrests for car theft, assault and battery and carrying a concealed deadly weapon . . . He reportedly served time in the state juvenile center in Dallas, Pa." Another story was entitled, "Two Youths Re-enact Media Street Attack." This story reported a staged re-enactment of the crime and read: "Speaking softly, Pierce who Police say has confessed to being the 'triggerman' described how the three youths encountered the victims and then indicated where the victims fell after the attack." Accompanying this story was a large picture of Pierce flanked by a policeman with a caption which read: "Alan Pierce indicates for C. I. D. Detective Edward Smith where one of the victims fell." Another article was titled, "Third Youth Held in Media, Chester Man, 20, Admits Being Gunman, Chief says."

Striking the balance between the right to a fair trial and the equally important right of free press has long been a complex and troublesome problem. See generally Symposium—A Free Press and a Fair Trial, 11 Vill. L. Rev. 677 (1966). The news media must be given wide latitude in reporting material about criminal trials, since the foundation of our society rests on freedom of thought and discussion. In *Sheppard v. Maxwell*, 384 U. S. 333, 86 S. Ct. 1507 (1966), Mr. Justice Clark, speaking for the majority of the United States Supreme Court, recognized the im-

portance and the need for a free and responsible press stating:

> "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' In re Oliver, 333 U. S. 257, 268, 68 S. Ct. 499, 92 L. Ed. 682 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.' Craig v. Harney, 331 U. S. 367, 374, 67 S. Ct. 1249, 1254, 91 L. Ed. 1546 (1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press * * * the broadest scope that could be countenanced in an orderly society.' Bridges v. State of California, 314 U. S. 252, 265, 62 S. Ct. 190, 195, 86 L. Ed. 192 (1941)."

Id. at 349-50, 86 S. Ct. at 1515-16. However, the publication of news accounts cannot interfere with the orderly administration of criminal justice. Mr. Justice Holmes stated the following in *Patterson v. Colorado*, 205 U. S. 454, 27 S. Ct. 556 (1907):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private or public print."

Id. at 462, 27 S. Ct. at 558.[2] We rule the basic theory of our system of criminal justice has been violated in the instant case. For the lower court to refuse a motion for a change of venue after the community had been informed by the authorities that Pierce was the confessed "trigger-man" with a past record for violent crimes, as well as pictures of a staged re-enactment of the crime—which is a confession in itself—coupled with the other widespread publicity was a denial of due process of law.

It has been recognized by the United States Supreme Court that under normal circumstances a claim of a due process violation requires a showing of identifiable prejudice to the accused. Nevertheless, there are certain pro-

---

2. In *Sheppard,* supra, Mr. Justice Clark stated:

"But the Court has also pointed out that '[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' Bridges v. State of California, supra, 314 U. S. at 271, 62 S. Ct. at 197. And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free or prejudice, passion, excitement, and tyrannical power.' Chambers v. State of Florida, 309 U. S. 227, 236-237, 60 S. Ct. 472, 477, 84 L. Ed. 716 (1940). 'Freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice.' Pennekamp v. State of Florida, 328 U. S. 331, 347, 66 S. Ct. 1029, 1037, 90 L. Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system * * * to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the court-room according to legal procedures.' Cox v. State of Louisiana, 379 U. S. 559, 583, 85 S. Ct. 466, 471, 13 L. Ed. 2d 487 (1965) (Black, j., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' " 384 U. S. at 350-51, 86 S. Ct. at 1516.

cedures employed by the states which involve such a probability of prejudice that they are deemed inherently lacking in due process. See *Sheppard v. Maxwell,* supra; *Estes v. Texas,* 381 U. S. 532, 85 S. Ct. 1628 (1965); *Turner v. Louisiana,* 379 U. S. 466, 85 S. Ct. 546 (1965); *Rideau v. Louisiana,* 373 U. S. 723, 83 S. Ct. 1417 (1963); and by this Court, see *Commonwealth v. Stewart,* 449 Pa. 50, A. 2d (1972). We hold that the nature of the accounts released by the police were so "inherently prejudicial" that Pierce need not have shown a nexus between the publicity and actual jury prejudice, and hence, he did not have the burden of showing identifiable prejudice.

We find the instant case analagous to the United States Supreme Court case of *Rideau v. Louisiana,* supra. In *Rideau,* the police staged a filmed interview with the accused in which he admitted committing a bank robbery, kidnapping, and murder and the "interview" was shown over the local television stations. In condemning such a practice, Mr. Justice Stewart, speaking for the majority of the Court, stated:

> "In the view we take of this case, the question of who originally initiated the idea of the televised interview is, in any event, a basically irrelevant detail. For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial —at which he pleaded guilty to murder. Any sub-

sequent court proceeding in a community is pervasively exposed to such a spectacle could be but a hollow formality." 373 U. S. at 726, 83 S. Ct. at 1419.

We believe that much of what was said in *Rideau* is applicable herein. In the instant case, as in *Rideau,* we believe that the deliberate release of the information that Pierce was the confessed "triggerman" in the double shooting, as well as the staged re-enactment of the crime "in a very real sense *was* [Pierce's] trial at which he pleaded guilty to murder." All the information released by the authorities clearly pointed to Pierce's guilt, and any prospective juror exposed to this publicity must surely have formed a definite opinion as to Pierce's guilt or innocence. Moreover, some of the information, such as the accused's past criminal record, was not admissible at trial, but it was available to the prospective jurors through the news accounts.[3] In the constitutional sense a fair trial necessarily demands the evidence developed against the accused shall

---

3. In *Marshall v. United States,* 360 U. S. 310, 79 S. Ct. 1171 (1959), the Supreme Court in the exercise of its supervisory powers decided the exposure of jurors through newspaper articles to the accused's prior record required a new trial stating:

> "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Holt v. United States, 218 U. S. 245, 251, 31 S. Ct. 2, 6, 54 L. Ed. 1021. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecutor's evidence. Cf. Michelson v. United States, 335 U. S. 469, 475, 69 S. Ct. 213, 218, 93 L. Ed. 168. It may indeed be greater for it is then not tempered by protective procedures." Id. at 312-13, 79 S. Ct. at 1173.

come from the witness stand in a public tribunal with the full judicial protection of such rights as: counsel, cross-examination, confrontation, and the right against self-incrimination.[4] These safeguards could not have been afforded the appellant, they were precluded from being fully effective by the pretrial news coverage.

It is not only the fact that the publicity was "inherently prejudicial" that troubles us about this case—it is also the source of the publicity. The information in this case was not reported as a result of independent research by the representatives of the news media—it came directly from the police. It was the authorities who released the fact that Pierce was the confessed "triggerman" with a past record, and the police who staged the "re-enactment" of the crime. Moreover, the District Attorney's Office is not free from some blame for the aroused tone of the com-

---

4. In *Irvin v. Dowd,* 366 U. S. 717, 81 S. Ct. 1639 (1961), Mr. Justice Clark stated the following:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. In re Oliver, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682; Tumey v. State of Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749. 'A fair tral in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. Thompson v. City of Louisville, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' Reynolds v. United States, 98 U. S. 145, 155, 25 L. Ed. 244." Id. at 722, 81 S. Ct. at 1642.

munity because his office released statements such as: "I am waiting for that misguided social worker to begin a fast and vigil at the hospital beds of these most recent victims of savage lawlessness. When the robbers are captured, I promise them a swift and very special treatment." The District Attorney's Office also refused to produce witnesses at an arraignment because of alleged telephone threats to the victims of "ultimate death."

Statements such as those of the police and the prosecutor in this case create an even more substantial risk of a denial of a fair trial, because of the position in the community these individuals hold, and also suggest an official disregard of safeguards inherent in a fair trial. Officers of the Commonwealth and the police have a special duty and responsibility to *all* of the citizens of the Commonwealth. They must never lose sight of the fact that an accused has a right to a fair trial by an impartial jury, that only a jury can "strip a man of his liberty," and a man is presumed innocent until *proven guilty in a court of law,* and that all men are guaranteed basic rights under the Constitution.

In *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629 (1935), the Supreme Court spoke of the special duty of a United States Attorney; we believe the language appropriately applies to any officer involved in a criminal investigation or prosecution. The Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id. at 88, 55 S. Ct. at 633.[5] This standard was violated in the present case.

In accordance with these views, we rule that in this Commonwealth policemen and members of the staffs of the office of District Attorneys shall not release to the news media: (a) the existence or contents of any statement or

---

5. In *Stroble v. California*, 343 U. S. 181, 72 S. Ct. 599 (1952), Mr. Justice Frankfurter, dissenting, stated the following:

"Thus, on the California court's own reading of the record, circumstances tending to establish guilt and adduced outside the courtroom before the trial had even begun were avidly exploited by press and other media, actively promoted by the prosecutor. The State court sanctioned this as not only permissible but as an inevitable ingredient of American criminal justice. That sanction contradicts all our professions as to the establishment of guilt on the basis of what takes place in the courtroom, subject to judicial restrictions in producing proof and in the general conduct of the proceedings. Jurors are of course human beings and even with the best of intentions in the world they are in the well-known phrase of Holmes and Hughes, JJ., 'extremely likely to be impregnated by the environing atmosphere.' Frank v. Mangum, 237 U. S. 309, 345, 349, 35 S. Ct. 582, 594, 595, 596, 59 L. Ed. 969. Precisely because the feelings of the outside world cannot, with the utmost care, be kept wholly outside the courtroom, every endeavor must be taken in a civilized trial to keep it outside. To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in an anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice. . . .

". . . To allow such use of the press by the prosecution as the California court here left undisciplined, implies either that the ascertainment of guilt cannot be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive popular revulsion against horrible crimes but do vindicate the sober second thoughts of a community. If guilt here is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all." Id. at 200-02, 72 S. Ct. at 609-10.

confession given by the accused, or his refusal to give a statement or to take tests; (b) prior criminal records of the accused including arrests and convictions; (c) any inflammatory statements as to the merits of the case, or the character of the accused; (d) the possibility of a plea of guilty; (e) nor shall the authorities deliberately pose the accused for photographs at or near the scene of the crime, or in photographs which connect him with the scene of the crime. See generally ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press. §§ 1.1 and 2.1 (Approved Draft 1968).

We hold that anything short of compliance with these standards can operate to deprive an accused of due process of law, as this type of material did in the instant case. Moreover, we strongly suggest that trial courts employ the precautions set forth in *Sheppard v. Maxwell,* supra, and *Commonwealth v. Hoss,* 445 Pa. 98, 283 A. 2d 58 (1971).

Judgment reversed and a new trial is ordered.

Mr. Chief Justice Jones took no part in the consideration or decision of this case.

OPINION OF THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA.

Alan Pierce was convicted, by a jury, of murder in first degree, robbery, violation of uniform firearms act, two counts of carrying a concealed deadly weapon, assault and battery, aggravated assault and battery, assault and battery with intent to kill and conspiracy. The jury imposed the death penalty on the murder charge.

Timely motions for new trial were filed alleging the following grounds, to wit: 1) The verdict is contrary to the evidence, 2) the verdict is contrary to the weight of the evidence, 3) the verdict is contrary to the law, 4) the defendant's oral statement of April 13, 1969 was admitted into evidence contrary to the law, 5) the defendant's written statement was admitted into evidence contrary to the law, 6) the defendant's reenactment of the crime was admitted into evidence contrary to the law, 7) the testimony of John Halota as an expert ballistics witness was admitted into evidence contrary to the law, 8) the testimony of Howard Montgomery was admitted into evidence contrary to the law, 9) the testimony of Howard Montgomery concerning the projectile removed from the body of Joseph O'Brien was admitted into evidence contrary to the law, 10) the testimony of Dr. John J. Courtney was admitted into evidence contrary to the law, 11) the testimony of seven witnesses not listed on the back of the indictments was admitted into evidence contrary to the law, 12) a potential juror who would not impose the death penalty was erroneously stricken for cause on motion of the prosecution.

Upon argument before the court en banc and presentation of briefs, defendant ignored motions above numbered 1, 2, 3 and 10 and raised, additionally, the question of venue. Stated precisely, defendant presses these issues:

1) Should a change of venue have been granted based on pretrial publicity and the fact that one victim is an officer of this court, 2) was defendant's confession involuntary in view of the incustody interrogation and the absence of counsel, 3) did defendant have the intellectual capacity to waive his constitutional rights, 4) was the admission of John Halota's testimony with regard to the ballistics characteristics of the bullet removed from the body of John Courtney prejudicial to the defendant in that John Halota had had no formal training in ballistics and was not formally qualified to give an expert opinion, 5) was defendant's right to a fair trial prejudiced by the admission of Howard Montgomery's opinion concerning the weapon which fired the O'Brien bullet in view of his lack of certainty, 6) was the defendant prejudiced by the introduction of testimony by Commonwealth witnesses who were not listed on the back of the indictments and 7) was defendant's right to a fair trial denied by the Court sustaining the Commonwealth's challenge for cause of a prospective juror who stated on voir dire that she would not impose the death penalty?

We will first touch briefly on the issues raised but not argued or briefed by counsel.

The Commonwealth's evidence tended to show that the defendant, accompanied by two others, accosted John J. Courtney and Joseph O'Brien during the evening of April 7, 1969 across the street from the Delaware County Court House, demanded money of them and shot both of them. Courtney later died of the wounds received in the assault, but O'Brien recovered. At the trial, O'Brien positively identified defendant as the one who did the shooting.

The Commonwealth established that death ensued from the wounds intentionally inflicted during the perpetration of a robbery by defendant accompanied by others,

in which the others also participated. This evidence, if believed by the jury, was sufficient to convict defendant of the charges beyond a reasonable doubt. The verdict was not, therefore, against the evidence, the weight of the evidence or the law.

Dr. John J. Courney, father of the dead victim was permitted to testify that the victim was, indeed, his son, and that prior to the assault he was alive and in good health. Since it was incumbent upon the Commonwealth to prove that the deceased was alive prior to the assault and was, in fact, the victim of that assault, we find no error in the admission of this testimony.

We turn now to the issues deemed important by defendant.

VENUE:

Rule 313 Pa. Rules of Criminal Procedure permits the court to grant a change of venue "when it is determined after hearing that a fair and impartial trial cannot be had in the county . . . ." Defendant argues that extensive pretrial publicity by newspapers, radio and television and the fact that one of the victims, O'Brien, is a member of the bar of this court made it impossible for the defendant to have a fair trial here.

After a hearing raising these venue issues, the court denied defendant's application. We affirm the denial.

Change of venue is a matter within the sound discretion of the trial court and will not be disturbed absent abuse of that discretion. Where the proof does not show that the trier of fact was biased or prejudiced against defendant, the change in venue should be refused. *Commonwealth v. Green,* 396 Pa. 137.

Of the seventy-six jurors available for duty, the majority had read or heard something about the case before trial. Only eight of these, however, had formed an opinion

as to guilt or innocence and of these, six stated that their opinion could be changed, and a verdict rendered on the evidence.

Of the twelve jurors and two alternates finally selected, six had read or heard nothing about the case and the remainder had formed no opinions. Where defendant's complaint is of pretrial publicity, the above accounting of its effect on the prospective and selected jurors shows that the publicity did not rerogate from defendant's ability to have a fair and impartial jury consider his case.

ADMISSABILITY OF CONFESSIONS:

Defendant argues that his confessions (written, oral and physical re-enactment) should not have been admitted against him because they were the product of custodial interrogation without the benefit of counsel and because the defendant has not the intellectual capacity to intelligently waive his constitutional rights.

These issues were fully covered in extensive suppression proceedings held prior to trial and at trial itself.

A review of the record indicates no error in the order denying the petition to suppress. Testimony of the Commonwealth established that the defendant was advised of all his constitutional rights, understood them and voluntarily waived them. He was not beaten or abused, or otherwise overcome in will.

Though no testimony was given by the defendant or any witnesses on his behalf at trial on the issue of voluntariness of the confessions, defense was permitted broad latitude in cross-examination and was permitted to argue facts to the jury contrary to what the Commonwealth witnesses had testified to. The jury having found defendant guilty, all facts and inferences therefrom leading to the conclusion that defendant's confession was voluntary must be taken as true.

The only evidence pertaining to defendant's intellectual capacity presented by defense during suppression proceedings was a letter from Jack B. Kremens, M.D., director of Haverford State Mental Hospital, stating, in part, that "on psychological testing he demonstrated a full scale IQ of 77 which places him at the border line range of intellectual functioning." Aside from the fact that this letter fails to state that defendant was incapable of understandingly waiving his rights, the conclusion which defendant aims for by virtue of the letter is completely overborne by other evidence. Defendant was twenty years old, gainfully employed at Sun Oil Company, able to intelligently answer questions at the suppression hearings and able to properly conduct himself at trial and cooperate with his attorney.

The absence of counsel during interrogation, which runs as a continuing thread through the confession problems, is not conclusive in this case. Defendant did not have counsel at the time, and knowing of his right to have an attorney appointed for him, free of charge, never requested an attorney. The right to counsel can be waived, even by those of limited intellectual capacity. *U. S. ex rel. Miner v. Erickson*, 428 F. 2d 623 (8th Cir.).

THE ADMISSION OF JOHN HALOTA'S TESTIMONY:

Detective John Halota testified that the bullet removed from Courtney's body was fired from the gun which was traced to a co-defendant. Detective Halota was permitted to give his opinion concerning the connection between the bullet and gun as an expert despite defendant's contention that he was unqualified by reason of lack of "formal" training on the subject.

The record shows that Detective Halota trained at the Philadelphia Ballistics Laboratory, had field training in ballistics and previously qualified as an expert in the

Courts of Delaware County. The record further shows that there are no formal schools or courses in firearms examination. Admissability of expert testimony lies within the sound discretion of the Trial Court. A witness whose knowledge is obtained by experience rather than formal scientific study and research can be competent to testify as an expert. *Commonwealth v. Nasuti,* 180 Pa. Superior Ct. 279. We see no abuse of discretion by the Trial Court in admitting Detective Halota's testimony.

THE ADMISSION OF HOWARD MONTGOMERY'S TESTIMONY:

Howard Montgomery was permitted to testify that in his opinion the bullet removed from Joseph O'Brien's body was fired from the same gun that fired the bullet which killed John Courtney. However, since the O'Brien bullet was flattened from striking bone, it was impossible to completely compare the striations on that bullet with the other items in evidence. Thus, he stated that he did not give this opinion with the same degree of certainty as his opinion concerning the unmutilated bullet in evidence.

Defendant argues that the lack of certainty made it error to admit this testimony. Absolute certainty is not a requirement of the admissibility of opinion evidence. *Commonwealth v. Gillum,* 202 Pa. Superior Ct. 370. Howard Montgomery testified that the bullet had striations that matched the gun in evidence. He is the head of the Ballistic Laboratory of the Philadelphia Police Department, has taught the subject and has qualified as a ballistic expert in numerous federal and state courts. It was not an abuse of discretion to admit his opinion as to the O'Brien bullet.

THE ADMISSION OF TESTIMONY OF COMMONWEALTH WITNESSES NOT LISTED ON THE BACK OF INDICTMENTS:

Seven witnesses not listed on the back of the indictments and whose names had not been on the list of those to be subpoenaed by the Commonwealth were permitted to

testify over the objection of defendant. Dr. Norbert Shulz testified as to having taken a bullet from the chest of Joseph O'Brien in an operation which occurred during the course of the trial. Mary Trueman, an official court reporter, testified as to having taken defendant's confession stenographically. Harry Pfaeffle was custodian of the evidence and testified as to the location of the evidence at various times. Of Elizabeth Julius, Andrea Vanderland, Helen Kurney and Marguerite Machman, one was custodian of hospital records and three were nurses from the operating room who testified concerning the transmittal of the bullet taken from John Courtney's body.

The Commonwealth is not limited in its production of evidence to those witnesses whose names are listed on the bills of indictments. *Commonwealth v. Gockley,* 411 Pa. 437. The right to confront ones "accusers" includes the right to know who they are. *Commonwealth v. Emmel,* 194 Pa. Superior Ct. 441. Though this right of a defendant requires the Commonwealth to list on the indictments all those who testify before the Grand Jury, proceedings from which defendant is excluded, it does not extend to the trial of the matter where all "accusers" are actually confronted by defendant.

A review of the record shows that defendant was hardly "surprised" by the testimony given by any of these seven witnesses. None of it was startlingly different from testimony previously given or different from that which was to be expected. We hold there was no error in permitting these witnesses to testify.

THE CHALLENGE FOR CAUSE OF A JUROR:

One juror was stricken for cause after the following voir dire:

> Mr. Reilly: Mrs. Graff, if you are selected to serve as a juror and should the jury, after hearing the evi-

dence, the Charge of the Court and arguments of counsel, find the defendant guilty of murder in the first degree, the jury shall deliver its verdict. Immediately thereafter, the jury shall consider the penalty. Could you, after hearing the evidence, the Charge of the Court and arguments of counsel, if the evidence warrants it, fix the penalty of death?

A. No, I could not.

Q. Is this a matter of conscience or religion?

A. Conscience.

Q. Now, despite your personal conscience, could you fix the penalty of death if after having heard the evidence, the arguments of counsel and the Charge of the Court, the case warranted the death penalty or would you automatically vote against the death penalty no matter what the trial might reveal?

A. I would vote against it.

Q. No matter what the evidence is?

A. Right.

Q. And under no circumstances could you ever vote for the death penalty?

A. I don't think I ever could.

The Court: Before you start, Mr. Jenkins, are you saying, Mrs. Graff, that if the Court were to Charge, after a defendant were found guilty of murder in the first degree, that the penalties are either life in prison or death, and the facts were such that the death penalty was warranted, that you would, regardless of the fact of the law or anything else in every case take an arbitrary position and say that I will not vote for the death penalty?

A. I do not feel I could ever vote for the death penalty.

Q. Regardless of the facts or the law?

A. No, I don't think I could.

Mr. Reilly: I will challenge for cause, your Honor.

The Court: I will sustain the move of challenge for cause.

Defendant argues that this violates his constitutional right to a jury not weighted to impose the death penalty. *Witherspoon v. Illinois,* 391 U. S. 510.

We hold that *Witherspoon* is not controlling in this case. The Court clearly limited its decision to the exclusion of veniremen who merely stated conscientious or religious objections to imposing the extreme penalty, but who, nonetheless, could impose it in the proper case in accordance with their oaths as jurors.

The Court stated it was not preventing the exclusion from the jury of those who say they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them.

In sustaining a challenge for cause, the Trial Court has wide discretion and will be reversed only for palpable abuse or error of law. *Commonwealth v. Rightnour,* 435 Pa. 111. In *Rightnour* three challenges were sustained and affirmed where, in response to questioning as to whether the veniremen could ever impose the death penalty, the answers were "I do not think I would ever vote for the death penalty," and "I believe that's what my answer would be."

We hold that the *Witherspoon* doctrine was not violated in this case.

Accordingly, we enter the following

ORDER.

And Now, to wit, this 24th day of February 1971, after consideration of the entire record, and following presentation of briefs and argument by counsel before the Court en banc, it is Ordered and Decreed that defendant's mo-

tions for New Trial be, and the same are hereby dismissed; the Sheriff of Delaware County is directed to bring defendant Alan Pierce from his place of incarceration to Court Room No. 4, Court House, Media, Pennsylvania at 10:00 o'clock A. M., Friday, March 19, 1971 for imposition of sentence.

By THE COURT

PAUL R. SAND, *J.*

ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR REARGUMENT.

May 3, 1973,

Denied.

By the Court